No. 80-1245

In the Supreme Court of the United States

OCTOBER TERM, 1980

SELCO SUPPLY COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed a petition for review filed 66 days after a final order was entered by the Environmental Protection Agency, when jurisdiction is limited by statute, 7 U.S.C. 136n(b), to those petitions filed within 60 days of entry of a final order.

2. Whether a petition for judicial review of a final order filed prior to disposition of a motion for reconsideration by the agency confers jurisdiction on the court of appeals to review the final order when the motion for reconsideration is subsequently denied.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 632 F. 2d 863.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1980. The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

Section 16(b) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136n(b), and 40 C.F.R. 168.70 (1979),[1] are set forth in Pet. App. B.

STATEMENT

1. This case arises under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, a comprehensive regulatory statute governing the sale, use, and distribution of pesticides. As a part of the regulatory scheme established under the Act, the Administrator of the Environmental Protection Agency (EPA) has the authority to register a pesticide for use, sale, or distribution upon a determination that the pesticide will "perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5)(C). The Administrator may cancel or suspend the registration of a pesticide upon a finding that the pesticide in question no longer meets the criteria for registration. 7 U.S.C. 136d. The registrant has a

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[1] Petitioner cites to the 1980 edition of Title 40 of the Code of Federal Regulations in referring to Part 168 of Title 40, which contained the applicable procedures in effect when the instant dispute arose. Part 168 does not appear in the 1980 edition of Title 40, because it was revoked on April 9, 1980, and replaced with consolidated rules governing the assessment of civil penalties under a number of statutes administered by the Environmental Protection Agency. 45 Fed. Reg. 24363 (1980). We therefore will cite to the 1979 edition of Title 40 of the Code of Federal Regulations.

continuing burden of demonstrating that its product is entitled to registration. *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 548 F. 2d 998, 1012-1018 (D.C. Cir. 1976); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 510 F. 2d 1292, 1297 (D.C. Cir. 1975); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 465 F. 2d 528, 532 (D.C. Cir. 1972).

Any person who violates an order for cancellation or suspension issued pursuant to 7 U.S.C. 136d is subject to criminal or civil penalties. 7 U.S.C. 136j(a)(2)(J); 7 U.S.C. 136*l*. Civil penalties are assessed administratively by EPA, following hearing, upon a finding that there has been a violation of the order cancelling or suspending the registration of a product. 7 U.S.C. 136*l*(a)(1) and (3). An order of the Administrator issued under FIFRA, including an order assessing a civil penalty, is reviewable in the court of appeals for the circuit wherein the person adversely affected by the order resides or has a place of business. 7 U.S.C. 136n(b). Review must be sought in the court of appeals "within 60 days after entry of such order." *Ibid.*

2. On December 24, 1975, after a full hearing at which petitioner was represented by counsel, the Administrator of EPA issued an order suspending registrations for some, but not all, of the uses of the pesticides heptachlor and chlordane. The Administrative Law Judge (ALJ) in the instant case found that a copy of the Administrator's suspension decision and order was mailed to petitioner, one of the registrants of these pesticides, but that petitioner had no record of having received the decision and order.

Subsequently, after two inspections of petitioner's premises, EPA determined that petitioner had sold certain formulas of the pesticides heptachlor and chlordane that had been banned by the Administrator's December 24, 1975 order of suspension. On May 5, 1977, administrative

enforcement proceedings were initiated against petitioner for these violations. A principal component of petitioner's defense was that it did not receive notice of the Administrator's suspension order.

On September 8, 1978, the ALJ issued his initial decision finding petitioner in violation of the suspension order and assessing a civil penalty against petitioner in the amount of $15,000. The ALJ found clear and convincing evidence that petitioner was represented by counsel in the suspension proceedings and concluded that counsel's receipt of the Administrator's suspension order constituted sufficient notice to petitioner. In any event, the ALJ concluded that petitioner itself could be held to have received notice of the suspension by virtue of a presumption that the notice mailed directly to it was in fact received. Petitioner did not file an administrative appeal from the decision of the ALJ, as it was authorized by regulation to do. See 40 C.F.R. 168.51 (1979). Under 40 C.F.R. 168.46(c) (1979), an initial decision of an ALJ that was not appealed to the Regional Administrator became the "final order" of the Regional Administrator after the passage of 30 days.

On September 25, 1978, petitioner filed a motion to reopen the preceedings before the ALJ, pursuant to 40 C.F.R. 168.70(b) (1979), for the purpose of taking further evidence on the question whether it was in fact represented by the counsel who appeared in the suspension proceedings. On March 19, 1979, the Regional Administrator of EPA denied petitioner's motion to reopen,[2] concluding that the evidence about petitioner's relationship with counsel who appeared in the suspension proceedings should have been presented to the ALJ who assessed the civil penalty for

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[2]Under the regulations, a motion to reopen was to be directed to the Regional Administrator, not the ALJ who first heard the case. 40 C.F.R. 168.70(a) (1979).

violating the suspension order and that the additional evidence would, at all events, be cumulative. See 40 C.F.R. 168.70(b) (1979). On the same date, the Regional Administrator also entered a final order concurring in the ALJ's assessment of the civil penalty.

On April 6, 1979, petitioner filed a motion pursuant to 40 C.F.R. 168.70(c) (1979), requesting the Regional Administrator to reconsider his entry of the final order. In this motion to reconsider, petitioner stated that it believed its motion of September 25, 1978 to reopen the proceedings before the ALJ tolled the time allowed under 40 C.F.R. 168.51 (1979) for filing a formal appeal to the Regional Administrator from the ALJ's decision. While the motion to reconsider was pending before the Regional Administrator, petitioner, on May 24, 1979, filed a petition in the United States Court of Appeals for the Tenth Circuit pursuant to 7 U.S.C. 136n(b) seeking review of the ALJ's September 8, 1978 decision and the Regional Administrator's order of March 19, 1979. See Pet. App. 2a. Petitioner's motion to reconsider subsequently was denied by the Regional Administrator on July 9, 1979. The Regional Administrator observed in his July 9 decision that, under 40 C.F.R. 168.46(c) (1979), the initial decision of the ALJ became final 30 days after it was issued, because petitioner did not appeal from that decision and the Regional Administrator did not elect, sua sponte, to review it. In the Regional Administrator's view, the March 19, 1979, order denying petitioner's motion to reopen the hearing before the ALJ merely "formalized" the order that had previously become final when petitioner did not take an appeal from the ALJ's decision. The Regional Administrator therefore denied petitioner's April 6 motion and "affirmed" the final order of March 19, 1979. Petitioner did not file a petition for review in the court of appeals following the July 9, 1979 denial of its motion for reconsideration by EPA.

3. The court of appeals dismissed the petition for review, concluding that the 60-day period within which a party may file a petition for review in the court of appeals under 7 U.S.C. 136n(b) is a "statute of limitations which bars late filings" (Pet. App. 2a-3a). Because petitioner's petition was filed 250 days after entry of the ALJ's decision of September 8, 1978, and 66 days after the Regional Administrator's order of March 19, 1979, the court of appeals held that it was without jurisdiction to entertain the petition. Pet. App. 3a. In addition, the court held that, even if petitioner's motion to reconsider filed on April 6, 1979, had tolled the running of the 60-day period, the petition for review filed in the court of appeals on May 24, 1979 was "premature" because EPA had not yet denied the motion to reconsider. Accordingly, the court of appeals held that the petition could not confer jurisdiction. Pet. App. 4a.

Judge Seymour concurred in the holding that the court was without jurisdiction because the petition for review filed in the court of appeals was premature, but she concluded that the April 6, 1979 motion to reconsider filed with EPA tolled the running of the 60-day period for seeking judicial review (Pet. App. 5a-6a).

ARGUMENT

This case presents no issue warranting review by this Court, particularly because the procedural regulations that governed this case are no longer in effect. See note 1, *supra*.

1. Section 16(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136n(b), provides in pertinent part:

> * * * [A]ny person * * * may obtain judicial review [of an order] by filing in the United States court of appeals * * * within 60 days after entry of such order, a petition praying that the order be set aside in whole or in part * * *.

Petitioner's petition for review, filed in the court of appeals on May 24, 1979, sought review of the ALJ's decision of September 8, 1978, and the Regional Administrator's order of March 19, 1979. The petition for review was filed more than 250 days after entry of the former and 66 days after entry of the latter. Thus, as to each, the petition for review was filed beyond the period of 60 days from entry of the order permitted under 7 U.S.C. 136n(b). Hence, the petition failed to confer jurisdiction upon the court of appeals, and the court of appeals properly dismissed the petition.

FIFRA is similar to other environmental protection statutes in providing a limited time within which review of EPA actions may be sought in the court of appeals. Compare 42 U.S.C. (Supp. II) 7607(b) (60-day period under the Clean Air Act); 33 U.S.C. 1369 (90-day period under the Clean Water Act). Congress' purpose in providing a limited time for invoking the exclusive jurisdiction of the courts of appeals to review actions of EPA was to insure prompt resolution of the validity of such actions and thereby to effectuate the environmental purpose of the statutes. See *Peabody Coal Co.* v. *Train*, 518 F. 2d 940, 942 (6th Cir. 1975); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 485 F. 2d 780, 783 (D.C. Cir. 1973). In interpreting the Clean Air Act and Clean Water Act, the courts uniformly have held that the time limit bars late filings. *Sun Enterprises Ltd.* v. *Train*, 532 F. 2d 280, 290-291 (2d Cir. 1977); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F. 2d 654, 661 (D.C. Cir. 1975); *Peabody Coal Co.* v. *Train*, *supra*, 518 F. 2d at 942. The same rule should be followed here.

2. Petitioner suggests (Pet. 3, 5), however, that the 60-day period within which a petition for review must be filed in the court of appeals should run either from the date of service of the EPA order (March 26, 1979) or from the date on which the order was docketed by the Regional

Hearing Clerk (March 22, 1979), allowing three additional days for service of the order by mail. If either of these dates were utilized, petitioner's petition for review would have been timely filed in the court of appeals, at least insofar as it sought review of the March 19, 1979, order denying the motion to reopen proceedings before the ALJ. However, both of petitioner's suggested approaches must be rejected because each is flatly inconsistent with the explicit statutory language in 7 U.S.C. 136n(b) that a petition for review must be filed "within 60 days after the *entry* of [the] order" (emphasis added). Compare Fed. R. App. P. 4(a) (notice of appeal in a civil case must be filed with the clerk of the district court within 30 days of the date of the entry of the judgment). The statute makes no reference to when the order is served on the parties, nor does it allow for extension of the 60-day period for an additional three days merely because a copy of the order is sent to the parties by mail.[3] See also *Peabody Coal Co.* v. *Train*, *supra*, 518 F. 2d at 942.

3.a Petitioner argues, however, that its filing of a motion for reconsideration on April 6, 1979, tolled the time for filing a petition for review in the court of appeals and that its petition for review filed on May 24, 1979, therefore was timely (Pet. 4-7). The court of appeals rejected this argument. It reasoned that Congress' evident concern that "resolution of EPA orders under FIFRA, like orders under

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[3]The court of appeals stated (Pet. App. 3a) that 40 C.F.R. 168.60(c)(1) (1979) permitted a party to seek judicial review within 60 days after service of the order, but it concluded that the regulation could not alter the plain language of the statute, which requires a petition for review to be filed within 60 days of when the order was entered. The court of appeals misread the regulation: it provided only that payment of a civil penalty shall be made within 60 days of service of the final order upon the party. The regulation did not purport to grant a party 60 days from the date of service within which to file a petition for review. For good reason, then, petitioner does not rely on 40 C.F.R. 168.60(c)(1) (1979) in arguing that its petition for review was timely.

other environmental protection statutes, should be made promptly" militated against extending the time for filing a petition for review in the court of appeals merely because a motion for reconsideration has been filed with the agency. Pet. App. 3a-4a.

Relying on cases arising under other statutes, however, petitioner argues that the Tenth Circuit's decision in this case is in conflict with other decisions that have held that where a motion for rehearing is filed with the agency there is no final agency action until rehearing is denied. Pet. 5-6, citing, *inter alia*, *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 541 (1970); *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961); and *Outland* v. *CAB*, 284 F. 2d 224 (D.C. Cir. 1960). It is not apparent that the principle of those cases applies to cases arising under FIFRA, in which the court of appeals perceived a particular congressional concern for prompt resolution of disputes.

However, even if petitioner were correct that the filing of a motion for reconsideration with EPA under the procedural regulations in effect when the current controversy arose should have postponed the time for filing a petition for review in the court of appeals, that argument would be wholly without merit under the procedural regulations that now govern the assessment of civil penalties under FIFRA. These regulations, which replace 40 C.F.R. Part 168 (1979), provide that a motion to reconsider "shall not stay the effective date of the final order unless specifically so ordered by the Administrator." 40 C.F.R. 22.32.[4] In view of

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[4]This Court has recognized that an agency has considerable discretion to determine when administrative procedures have been sufficiently exhausted and agency action is therefore "final" for purposes of judicial review. *Matthews* v. *Eldridge*, 424 U.S. 319, 330 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975). Accordingly, there would appear to be no reason why an agency could not make a determination that, in general, motions for reconsideration do not raise sufficiently

this explicit provision in the current regulations, petitioner's argument about the effect of a motion for reconsideration on the timing of judicial under the superseded procedural regulations implementing FIFRA does not present an issue of current or general importance warranting review by the Court.

b. In any event, it does not appear that petitioner could obtain review in the court of appeals on the merits of the ALJ's decision of September 8, 1978, even if it were correct that a petition for administrative reconsideration ordinarily postpones the time within which judicial review must be sought. As pointed out above, because petitioner did not file an appeal from the ALJ's decision, that decision became the "final order" of the Regional Administrator, without further proceedings, after the expiration of 30 days. See 40 C.F.R. 168.46(c) (1979). Under then-current regulations, a motion for reconsideration had to be filed within 10 days of service of the "final order." 40 C.F.R. 168.70(c) (1979). Yet here, the motion to reconsider was not filed until April 6, 1979, far more than 10 days after the ALJ's decision was served upon petitioner and also far more than 10 days after that decision became final when no administrative appeal was taken from it. As a result, the motion for reconsideration filed on April 6, 1979, could have been timely only insofar as it applied to the Regional Administrator's order of March 19, 1979 denying petitioner's motion to reopen the hearing before the ALJ.[5] And because only a timely motion for reconsideration could postpone the time for filing a petition for judicial review, it follows that the petition for

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meritorious claims to warrant postponement of the effective date of the "final order," while retaining the discretion to postpone that effective date on a case-by-case basis where the need arises. That is what EPA has done in its new regulations.

[5]That order was received by petitioner on March 27, 1979, 10 days before it filed its motion for reconsideration.

judicial review could be timely only as to the Regional Administrator's March 19 order. There can be little doubt that the Regional Administrator did not err in declining to order the ALJ to reopen the proceedings to receive additional evidence about petitioner's relationship with its attorneys in the suspension proceedings: that evidence was not "newly discovered" and could have been presented to the ALJ in the first instance. Therefore, petitioner has not been prejudiced by the court of appeals' dismissal of the petition for review.

4. Finally, even if petitioner were correct that its filing of a motion for reconsideration on April 6, 1979, postponed the time for filing a petition for judicial review until the motion for reconsideration was denied by EPA, the court of appeals nevertheless was without jurisdiction here because petitioner did not file a petition for review in the court of appeals after EPA denied its motion for reconsideration on July 9, 1979. The premise of the cases that have held that a motion for reconsideration filed with the agency postpones the time for seeking judicial review is that until the motion is acted upon, there is no "final" agency action subject to judicial review. *American Farm Lines* v. *Black Ball Freight Service, supra*, 397 U.S. at 541. Thus, under petitioner's theory, its only petition for review, filed in the Tenth Circuit on May 24, 1979, was filed *before* EPA's action was final. It was therefore premature and could not vest jurisdiction in the court of appeals.

Petitioner attempts to avoid this consequence by citing (Pet. 9) cases that have held that a notice of appeal filed in district court before the district court judgment actually becomes final may, in some circumstances, be deemed adequate to take an appeal from the judgment when it later becomes final. It is not clear that cases governing appeals from district courts apply to petitions in the courts of appeals for review of administrative action, which must

take into account the doctrine of exhaustion of administrative remedies. Moreover, by virtue of the 1979 amendments to Fed. R. App. P. 4, the cases relied upon by petitioner are of doubtful validity even as regards appeals from the judgments of district courts. As amended, Rule 4(a)(4) provides that a notice of appeal filed in district court before disposition by the district court of a motion for a new trial or other motion for reconsideration "shall have no effect" and that "[a] new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." By parity of reasoning, the petition for judicial review of EPA's action filed before EPA disposed of petitioner's motion for reconsideration could "have no effect," and a new petition for review therefore had to be filed in the court of appeals within 60 days of EPA's July 9 order denying the motion for reconsideration. Petitioner failed to file a petition for review in the court of appeals after July 9. Accordingly, the court of appeals properly concluded that it was without jurisdiction in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-02